No. 17314

In the United States Court of Appeals for the Ninth Circuit

M&R INVESTMENT COMPANY, INC., d/b/a DUNES HOTEL AND CASINO, AND FRED MILLER, DON RICH, MARVIN COLE, HARRY RIGGS, GRIMLEY ENGINEERING, INC., d/b/a TRANS-GLOBAL AIRLINES, AND CATALINA AIR TRANSPORT d/b/a CATALINA AIRLINES, PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

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FILED
MAY 22 1962
FRANK H. SCHMID, CLERK

INDEX

	Page
Jurisdictional statement	1
Counterstatement of the case	2
Statutes involved	8
Argument	8
1. The Board properly found that the Dunes Magic Carpet Tours involved "air transportation" within the meaning of the Act	8
2. The Board did not err in receiving and considering evidence of petitioners' activities ante-dating the Federal Aviation Act of 1958	11
3. There was ample legal and factual basis for the Board's order against Rich and Miller	13
4. The Board's order is sufficiently clear and is not unlawfully broad	17
Conclusion	19
Appendix	20

CITATIONS

Cases:

Consolidated Flower Shipments, Inc. v. *C. A. B.*, 213 F. 814 (C. A. 9, 1954)	15
Federal Trade Commission v. *Broch & Co.*, 368 U.S. 360 (1962)	17, 18
Federal Trade Commission v. *Cement Institute*, 333 U.S. 683 (1948)	12
Federal Trade Commission v. *Standard Education Society*, 302 U.S. 112 (1937)	14, 15, 16
Great Lakes Airlines v. *Civil Aeronautics Board*, 291 F. 2d 354 (C.A. 9, 1961), *cert. denied*, 368 U.S. 890	17
Las Vegas Hacienda v. *Civil Aeronautics Board*, 298 F. 2d 430 (C.A. 9, 1962)	3, 5, 7, 9, 10, 13, 15, 17
Mandel Bros., Inc. v. *Federal Trade Commission*, 254 F. 2d 18 (C.A. 7, 1958), rev'd on other grounds, 359 U.S. 385	14
N.L.R.B. v. *Clausen*, 188 F. 2d 439 (C.A. 3, 1951)	12
North American Airlines v. *Civil Aeronautics Board*, 240 F. 2d 867 (C.A.D.C. 1956), *cert. denied*, 353 U.S. 941	17

640381—62——1

Cases—Continued Page

R. J. Reynolds Tobacco Co. v. *Federal Trade Commission*, 192 F. 2d 535 (C.A. 7, 1951) ... 13

S.E.C. v. *Universal Service Ass'n*, 106 F. 2d 232 (C.A. 7, 1939) ... 15

Shores and Brown Common Carrier Application, 26 M.C.C. 243 (1940) ... 11

Standard Distributors v. *Federal Trade Commission*, 211 F. 2d 7 (C.A. 2, 1954) ... 15

Superior Engraving Co. v. *N.L.R.B.*, 183 F. 2d 783 (C.A. 7, 1950) ... 12

Terminal Taxicab Co. v. *Kutz*, 241 U.S. 252 (1916) ... 11

United States v. *Segelman*, 117 F. Supp. 507 (W.D., Pa., 1953) ... 12

Statutes:

Civil Aeronautics Act of 1938, 52 Stat. 973 ... 7, 13

Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 *et seq.*):

Section 101(20) ... 5, 9, 20

Section 101(21) ... 5, 8, 9, 21

Section 204 ... 1

Section 401(a) ... 1, 2, 8, 11, 18, 21

Section 902 ... 18

Section 1002 ... 1

Section 1006 ... 1

Section 1007 ... 18

Regulations:

14 C.F.R. 45 ... 2

Legislative Materials:

H. Rept. No. 2360, 85th Cong., 2d Sess ... 13

H. Rept. No. 2556, 85th Cong., 2d Sess ... 13

In the United States Court of Appeals for the Ninth Circuit

M&R Investment Company, Inc., d/b/a Dunes Hotel and Casino, and Fred Miller, Don Rich, Marvin Cole, Harry Riggs, Grimley Engineering, Inc., d/b/a Trans-Global Airlines, and Catalina Air Transport d/b/a Catalina Airlines, petitioners

v.

Civil Aeronautics Board, respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the order here involved rested on Sections 204, 401 and 1002 of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 *et seq.*). The jurisdiction of this Court is invoked under Section 1006 of the Federal Aviation Act (49 U.S.C. 1486) which provides for the filing of a petition for review within sixty days after entry of the Board's order. The Board's order was entered on February 1, 1961, and the petition for review was filed on March 28, 1961.

COUNTERSTATEMENT OF THE CASE

Petitioners seek review of the Civil Aeronautics Board's Order E-16331 (R. 78, reconsideration denied, R. 106) in which they were found to have engaged in air transportation within the meaning of the Federal Aviation Act (*i.e.*, common carriage) by transporting passengers by aircraft as part of package tours, known as the "Dunes Magic Carpet Tours," between California points and Las Vegas, Nevada. Section 401(a) of the Act prohibits a person's engaging in air transportation without a certificate of public convenience and necessity issued by the Board and, since petitioners admittedly held no such certificate, the Board ordered all of them to cease and desist from further violation of Section 401(a).

M & R Investment Company, Inc., is a corporation which operates the Dunes Hotel, a resort hotel and gambling casino in Las Vegas.[1] Trans-Global Airlines (Trans-Global) and Catalina Air Transport (Catalina) are "Part 45 carriers," *i.e.*, carriers who hold operating certificates issued by the Federal Aviation Agency attesting to their compliance with various safety regulations applicable to private commercial carriage but who hold no economic authority issued by the Board for common carriage.[2] Donald Rich

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[1] This petitioner is hereinafter referred to as "Dunes."

[2] "Part 45 carriers" take their name from Part 45 of the Civil Air Regulations (14 C.F.R. 45) which imposes the requirement that a safety operating certificate be obtained for private carriage for hire or other operations not subject to the economic regulatory provisions of the Act and which establishes the standards therefor. Such a certificate confers no license to engage in "air transportation" (common car-

and Fred Miller were stipulated to be "principals" in Trans-Global (R. 163) and, as partners in still another concern, they also owned some of the aircraft involved in the tour operations.[3]

Insofar as the traveling public was concerned, the Dunes Magic carpet Tours were virtually identical to the "Champagne Tours" which this Court recently held to involve air transportation within the meaning of the Act. *Las Vegas Hacienda* v. *Civil Aeronautics Board,* 298 F. 2d 430 (1962), certiorari pending, S. Ct., No. 821. For a single price, tour patrons purchased a package which included round-trip air transportation from Los Angeles and Burbank to Las Vegas, ground transportation between the airport at Las Vegas and the Dunes Hotel and various goods and services at the hotel.[4] Tour patrons were solicited from the general public by advertisements in classified telephone directories, newspapers and brochures (R. 26, 323, 347–364). The advertisements and brochures featured such lead lines as "Fly Free to Las Vegas" and included schedules of daily departures. Tours were sold at Dunes' sales offices in the Los Angeles area and at a ticket counter main-

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riage in interstate or foreign commerce) and issuance of a Part 45 certificate does not constitute a determination that the transportation actually performed is not "air transportation."

[3] Additionally, in their petition for stay filed with this Court on January 31, 1962, petitioners informed the Court that Rich and Miller were the officers, directors, and sole stockholders of Trans-Global Airlines. The record shows that Rich was President (R. 163) and Miller vice-president (R. 193).

[4] These were two cocktails and dinner at the hotel, a guaranteed show reservation and a bottle of champagne (R. 27).

tained by Dunes at the Lockheed Air Terminal (R. 26). They were also sold by travel agents on a commission basis and by Catalina (*ibid.*).

In terms of the internal arrangements, the tours differed somewhat from those involved in *Hacienda*. In that case, the hotel owned the aircraft, held the safety authority and conducted all phases of the operation, including physical operation of the aircraft, through its own employees. Here, however, the actual physical operation of the aircraft was performed by Trans-Global and Catalina under contract with Dunes (R. 26).[5] Some of the aircraft utilized, moreover, were owned by the carrier while others were leased to Dunes by Rich and Miller and operated by Trans-Global.[6] In all other respects, the tours were conducted by Dunes (R. 26).

Just as the Magic Carpet Tours were of the same general character as those involved in *Hacienda*, so

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[5] Under these contracts, Dunes paid Trans-Global and Catalina a fixed amount for each round-trip flight and guaranteed them a certain number of flights per month. Trans-Global and Catalina were fully responsible for the operation of the aircraft and were required to pay the operating expenses and cost of all maintenance; to provide and pay a crew consisting of a captain, first officer, and stewardess; to provide the necessary cabin supplies; and obtain an insurance policy insuring each passenger seat for $100,000, naming Dunes as an additional insured (R. 331–337, 341–346).

[6] The examiner's findings (R. 31–32) disclose that Trans-Global and Catalina both operated tour flights for Dunes during 1958, each utilizing its own aircraft. During 1959 Dunes leased two aircraft from Rich and Miller. It had been contemplated that Catalina would operate the tours throughout 1959 but Catalina was unable to get the two aircraft placed on its operating authorization and accordingly the flights were operated by Trans-Global. For a while Dunes paid Catalina for these flights, but later payment was made directly to Trans-Global.

the central issue in the proceeding before the Board was the same, *i.e.,* whether the tours involved "the carriage by aircraft of persons . . . as a common carrier for compensation or hire" (Section 101(21), *infra,* p. 21).[7] Most of petitioners' contentions on this score, moreover, were the same as those advanced in *Hacienda.* Thus, they argued (1) that the service was not "for compensation or hire" because no portion of the total tour price was allocated to the so-called "free" transportation; (2) that the service was offered "in furtherance of a business or vocation" within the meaning of the statutory definition of "air commerce" (Section 101(20), *infra,* p. 20) and hence could not be held to be "air transportation"; and (3) that the so-called "primary business test" followed by the Interstate Commerce Commission with respect to property under the Motor Carrier Act required a holding that private carriage was involved. The examiner (R. 41–49) and the Board (R. 81) rejected these contentions for the same reasons that they had rejected them in *Hacienda.* Since this Court agreed with the Board in *Hacienda,* any further discussion of the Board's opinion on the same points here is unnecessary.

In addition to the foregoing contentions, petitioners also argued that common carriage was not involved because the flights were allegedly available

[7] As the Court is aware from its consideration of the *Hacienda* case, the quoted language is "central" (298 F. 2d at p. 433) in the statutory definition of "air transportation" and it is only to engage in "air transportation" that economic authorization from the Board is necessary.

only to "guests" of the Dunes Hotel and hence that the essential element of holding out was lacking. This contention rested primarily upon the fact that tour patrons were expected to sign a "guest register" at the airport before boarding the aircraft; that some of the newspaper advertisements stated that the tours were available only to hotel guests; and that the nontransportation features were available only at the Dunes Hotel (R. 29). The Board rejected the contention. It pointed out that a person may be a common carrier despite the fact that his offer relates to a limited portion of the public, so long as it is made to anyone of the public who chooses to place himself in the class to which the offer is made and held that this rule applies to *bona fide* hotel guests inasmuch as they are themselves members of the general public (R. 37–41). Moreover, the Board held, the contention had no basis in fact since the tours were held out to "the entire population of the Los Angeles area" and anyone from the general public was eligible so long as he paid the price of the tour (R. 37). The "guest register requirement" was found to be no more than a device adopted to lend color to the claim that the service was limited to hotel guests (*ibid.*).[8]

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[8] In point of fact, it was not until the tours had been in operation for almost a year that the newspaper advertisements began to contain the statement that the service was limited to hotel "guests" and the "guest register requirement" was not seriously enforced until after the complaint was filed against petitioners (R. 29–30).

The Board also found no merit in petitioners' argument that evidence of violations occurring prior to January 1, 1959, the effective date of the Federal Aviation Act, was improperly received in evidence.[9] This contention rested upon the fact that the complaint, which was filed on June 15, 1959 (R. 1), charged violations of the Federal Aviation Act and it was petitioners' view that their activities during the time the predecessor Civil Aeronautics Act was in effect could not be considered.[10] Noting that the provisions involved were the same under both Acts, that there had been no interruption of the Board's authority under either Act, and that petitioners' violations began in 1958 and continued throughout 1959 without interruption, the Board found that petitioners' contention was one "of form rather than substance and, therefore, is not well taken" (R. 53–54). Assuming error, it continued, the error was in any event harmless since there was "substantial evidence . . . concerning violations committed . . . in 1959" (R. 53).

The petitioners questioned the propriety of including Rich and Miller in the cease and desist order but the Board rejected their contentions. Noting

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[9] The Civil Aeronautics Act of 1938 (52 Stat. 973) was superseded by the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 et seq.). Insofar as the provisions here involved are concerned, and as this Court recognized in *Hacienda* (298 F. 2d at p. 432), the 1958 Act is merely a recodification of the earlier statute. The reasons for the substitution of the one for the other are explained in the argument, infra, p. 13.

[10] The same contention was made in *Hacienda* but was abandoned on appeal.

640381—62——2

that Rich and Miller were principals in Trans-Global, and, moreover, that in their individual capacities they provided the aircraft used on the tours, the Board concluded that the order should run against them as individuals if it was to be completely effective (R. 52).

Finally, and like the petitioners in *Hacienda,* the petitioners objected to the breadth of the order recommended by the examiner which enjoined them from "engaging directly or indirectly in air transportation within the meaning of Sections 101(10) and 101(21) of the Federal Aviation Act of 1958, in violation of Section 401(a) of the Act" (R. 58). The Board nevertheless adopted the recommended order, holding, as it had in *Hacienda,* that reference to the initial decision would "resolve any possible doubts as to what transportation services are prohibited" (R. 84).[11]

STATUTES INVOLVED

The provisions of the Federal Aviation Act principally involved are set forth in the Appendix, *infra,* pp. 20–21.

ARGUMENT

1. The Board properly found that the Dunes Magic Carpet Tours involved "air transportation" within the meaning of the Act

Petitioners concede, as they must, that the status of their transportation activities under the Act is

[11] The examiner's initial decision was adopted by the Board as its own findings and conclusions (R. 80) and thus was incorporated into the cease and desist order by specific reference (R. 87).

settled by the Court's decision in *Hacienda* unless there is some factual distinction (Br., p. 12). They have, therefore, abandoned their contentions that the tour flights were not operated for compensation or hire; that a contrast of the statutory definitions of "air commerce" (Section 101(20)) and "air transportation" (Section 101(21)) required a finding that they fell only within the former and hence were subject only to safety regulation; and that the Board was required to apply the "primary busines doctrine" and hold that the tours involved private carriage. In an attempt to distinguish the two cases, they pursue only their contention that the requisite holding out was lacking because the Magic Carpet flights were available only to guests of the Dunes Hotel (Br., pp. 12–14). The argument is wholly without merit.

As the Court recognized in *Hacienda* (298 F. 2d at p. 434), "the dominant factor in fixing common carrier status is the presence of a 'holding out' " of the service to the general public. Petitioners' contention is that the requisite holding out is lacking here because the service was limited to "guests" of the Dunes Hotel. Taken at face value this is obviously not so, since the transportation service was an integral part of a tour which was held out and available to the entire population of the Los Angeles area. It was limited to "guests" only in the sense that the purpose of the tour was to attract the general public to the hotel and casino, and to that end the tour was arranged in such manner as to attempt to insure that those members of the general public who purchased

it would actually patronize the hotel and casino facilities after arrival in Las Vegas. In other words, when petitioners say that it was limited to "guests" they mean simply that the tour was designed to attract only those members of the public who desired to go to the Dunes Hotel. This clearly does not in any way detract from its status as common carriage, any more than it did in *Hacienda*.[12] As this Court there pointed out, the Board "correctly" holds that "the purpose which motivates" the provision of a transportation service is not determinative, and it "is immaterial that the service offered will be attractive only to a limited group . . ." (298 F. 2d at p. 435). The point is that petitioners' transportation service was held out and available to any member of the general public who wished to avail himself of the facilities at the Dunes Hotel and this is enough. As the Interstate Commerce Commission said in an identical situation under the Motor Carrier Act, "the

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[12] It is true that in *Hacienda* there was evidence that the tour operator was not always successful in its efforts to screen out persons who desired to purchase the tour simply as a means of obtaining cheap transportation and even that some salesmen connived at such purchases. Neither the Board's decision, however, nor that of this Court rested upon these occurrences.

In this connection, we note petitioners' reference to two factors not present in *Hacienda*, *i.e.*, the guest register requirement and the limitation in some of the newspaper advertisements to the effect that the tour was available only to guests of the hotel. The former was obviously an idle gesture, a fact borne out by petitioners' failure to attempt to enforce it seriously until after the filing of the complaint (R. 29–30). As to the advertising, the limitation placed no greater restriction on the availability of the tour than was actually involved in *Hacienda*.

public nature of the service . . . cannot be destroyed merely because applicants desire to limit their transportation facilities to those persons who also proposed to utilize their non-transportation [hotel] facilities." *Shores and Brown Common Carrier Application,* 26 M.C.C. 243, 245 (1940).[13]

2. The Board did not err in receiving and considering evidence of petitioners' activities ante-dating the Federal Aviation Act of 1958

The administrative complaint against petitioners was docketed on June 15, 1959, and charged that their operation of the Magic Carpet Tours was a violation of section 401(a) of the Federal Aviation Act of 1958, and it was that Act which the Board found they had violated. Since the statute did not become effective until January 1, 1959, petitioners assert that the Board improperly received and considered evidence with respect to the operation of the tours from the date of their inauguration in May, 1958 (R. 26), until January 1, 1959.[14]

While petitioners couch their argument on this point in terms of an alleged lack of substantial evi-

[13] Even where a transportation service is limited to persons who are in fact already guests of the hotel, the Supreme Court has held that common carriage is involved. *Terminal Taxicab Co.* v. *Kutz*, 241 U.S. 252 (1916). The Court there held that hotels hold their services out to the general public and transportation provided exclusively for such members of the public as choose to become guests of the hotel "affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so . . . The public does not mean everybody all the time.

[14] As previously indicated, the same argument was made in the petition for review in *Hacienda*, but was abandoned.

dence if the pre-1959 evidence is disregarded, it is difficult to believe that they are serious. As the examiner pointed out (R. 53), there is ample evidence to sustain the Board's order without regard to that which petitioners say was improperly received. See, *e.g.,* R. 164–192; 194–197; 199–201; 202–204; 210–301; 354–374. Indeed, the testimony of petitioners' witnesses and the stipulations of their counsel were confined to 1959 activities and make out an overwhelming case in support of the Board's decision.

Moreover, petitioners' argument is based on a misconception of the nature of the Board's action. The purpose of the proceedings was not to penalize petitioners for their past misconduct but rather to determine whether the Board should issue a remedial order to prevent them from further violating the law. In circumstances such as these, and especially since a continuous course of conduct was involved, it was entirely proper for the Board to consider petitioners' past conduct as throwing light on and revealing the character of their present activities, even if such past conduct were somehow barred from being made the subject of the proceedings. *F.T.C.* v. *Cement Institute,* 333 U.S. 683, 705 (1948); see also, *N.L.R.B.* v. *Clausen,* 188 F. 2d 439, 443 (C.A. 3, 1951); *Superior Engraving Co.* v. *N.L.R.B.,* 183 F. 2d 783, 791 (C.A. 7, 1950).

Furthermore, it is clear that the general savings clause (1 U.S.C. 109) preserved petitioners' liability under the old statute (*United States* v. *Segelman,* 117 F. Supp. 507 (D.C.W.D. Pa. 1953)), and, as

noted in the margin, the Board's action was in accordance with the plain intent of Congress.[15]

3. There was ample legal and factual basis for the Board's order with respect to Rich and Miller

Petitioners contend that the Board could not reach Rich and Miller primarily because there was no showing that they formed the Trans-Global corporation in order to insulate themselves against agency action or that they could be expected, as individuals, to attempt another violation of the law. Their contention rests upon an erroneous view of the law and an unrealistic appraisal of the evidence. Insofar as the law is concerned, their principal reliance is upon *R. J. Reynolds Tobacco Co.* v. *Federal Trade Com-*

[15] As the Court recognized in *Hacienda* (298 F. 2d at p. 432), the provisions of the Federal Aviation Act with which we are here concerned are identical to the corresponding provisions of the Civil Aeronautics Act. This results from the fact that the purpose of the Federal Aviation Act was to make extensive changes in the field of safety regulation while leaving unchanged the provisions relating to economic regulation. Congress noted that this could have been accomplished by a section-by-section amendment of the 1938 Act or by an amendment of the 1938 Act "to read as follows," but rejected both of these methods solely because the first was considered as fraught with danger and the second was considered cumbersome. See H. Rept. No. 2360, 85th Cong., 2d Sess., p. 10; H. Rept. No. 2556, 85th Cong., 2d Sess., p. 90. It chose instead to repeal the entire 1938 Act and to enact a new statute which, for present purposes, was a reenactment of the one repealed. But, in doing so, it made clear its intention that there was to be no break in the continuity of coverage, specifically stating with respect to the unchanged provisions that "reenactment . . . shall be considered to have the same effect as though the new act were amending the Civil Aeronautics Act 'to read as follows.'" H. Rept. No. 2360, 85th Cong., 2d Sess., p. 11.

mission, 192 F. 2d 535 (C.A. 7, 1951), which, they say (Br. p. 17), "clarified" the Supreme Court's holding in *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112 (1937). What petitioners overlook, however, is that the *Reynolds* case has been specifically overruled on the precise point here involved. *Mandel Bros., Inc.* v. *Federal Trade Commission,* 254 F. 2d 18, 22–23 (C.A. 7, 1958).[16] The court recognized in *Mandel,* as the Supreme Court had in *Standard Education Society,* that a corporation can act only through its officers and agents and those who direct the affairs of a corporation in violation of the law may be enjoined from further violation individually.[17] Contrary to petitioners' contention, the legality of an order directed to the principals of a corporate law violator does not depend upon a showing that they formed the corporation for purposes of avoiding action by the agency or that the individuals may be expected to attempt another vio-

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[16] Reversed on other grounds, *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385 (1959).

[17] The court of appeals in *Mandel* also rejected the contention, here advanced by petitioners, that those directing the corporation's affairs must be named in the administrative complaint. Moreover, there is no basis for the contention that Rich and Miller were not administrative respondents. They were charged in the complaint both as individuals and as partners in Trans-Global (R. 2). At the hearing, it was stipulated that Trans-Global was a corporation rather than a partnership and the corporation was substituted for the partnership as a respondent (R. 163), but nowhere on the record does it appear that the corporation was substituted for the individual respondents or even that any effort was made to have it substituted.

lation of the law.[18] *Standard Distributors* v. *Federal Trade Commission,* 211 F. 2d 7, 15 (C.A. 2, 1954). In that case, there was no showing that the individual, who was president of the corporation, had had anything whatsoever to do with the violations; indeed, he had attempted to prevent the practices of the corporation's employees which gave rise to the proceeding. Judge Learned Hand wrote, nevertheless, that under *Standard Education Society* the order may, without more, "include those officers of a corporation who are in top control of the activities that the Commission finds to have violated the Act."

This Court's holding with respect to Price in *Hacienda* is not to the contrary. It was based upon the fact that the record was insufficient to establish that Price had participated in Hacienda's violation as a principal. Indeed, the Court noted that Price could have been included had he been shown to be a principal, citing *Securities & Exchange Commission* v. *Universal Service Ass'n,* 106 F. 2d 232, 238 (C.A. 7, 1939); *Consolidated Flower Shipments, Inc.* v. *Civil Aeronautics Board,* 213 F. 2d 814, 818 (C.A. 9, 1954).

Rich and Miller cannot seriously dispute the fact that they dominate the Trans-Global corporation. They stipulated to being its principals (R. 163), and have added substance to this generality by admitting that they are its officers, directors, and sole stock-

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[18] If this latter factor were required, it would seldom, if ever, be possible to issue a cease and desist order until there had been at least two violations. The whole purpose of any such order, no matter at whom directed, is to preclude the possibility of subsequent violations.

holders (R. 163, 193).[19] Obviously, therefore, they acted with "the same freedom as though no corporation existed." [20] The record clearly discloses that, as the persons responsible for directing the affairs of the corporation, they displayed willingness to make Trans-Global a partner with Dunes in the violation, by providing the regularly-scheduled service required by Dunes' holding out. In view of these circumstances, the Board was clearly justified in treating Rich and Miller as the equivalent of Trans-Global and in effect holding that the violations of the corporation were also the violations of the individuals. Moreover, it is important to bear in mind that Trans-Global owned no aircraft (R. 193). Rather, the aircraft which it used were owned by Rich and Miller (R. 52). Thus, the corporation was in reality no more than a paper carrier. Unless Rich and Miller are also to be restrained, it would be a simple matter for them to band together with some other hotel to provide similar tours without operating through Trans-Global and thus possibly to defeat a contention that such activities were conducted as successors and assigns of Trans-Global.

In sum, and unlike *Hacienda,* a separate corporation, wholly owned, directed, and dominated by Rich and Miller, here provided an essential element of the offense, *i.e.,* carriage pursuant to Dunes' holding out. In other words, their separate company in effect combined with Dunes to provide a transportation

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[19] See also petition for stay, filed herein on January 30, 1962, together with affidavit of Rich in support thereof.

[20] *Standard Education Society*, *supra*, 302 U.S. at p. 120

service to the general public. It is settled that in such cases the Board may reach all those participating in the venture and those who direct the corporate participants. *North American Airlines* v. *Civil Aeronautics Board,* 240 F. 2d 867 (C.A.D.C., 1956), *cert. denied,* 353 U.S. 941; *Great Lakes Airlines* v. *Civil Aeronautics Board,* 291 F. 2d 354 (C.A. 9, 1961), *cert. denied,* 368 U.S. 890.

4. The Board's order is sufficiently clear and is not unlawfully broad

Petitioners' final argument that the Board's order is too broad and indefinite is based entirely on the erroneous premise that the order can be read as enjoining all conduct that might constitute "air transportation," within the meaning of the Act. This Court rejected the same contention with respect to an identical order in *Hacienda* and held that it enjoined only the type of conduct covered by the Board's complaint and opinion (298 F. 2d at p. 439) and, just one day prior to the Hacienda decision, the Supreme Court held that an order couched in similar broad terms was to be interpreted as dealing only with "future violations identical with or like or related to the violations * * * found to have [been] committed, or as forbiding 'no activities except those which if continued would directly aid in perpetuating the same old unlawful practices.'" *Federal Trade Commission* v. *Broch & Co.*, 368 U.S. 360, 366 (1962).[21] Indeed, the Board itself said as

[21] Like this Court's opinion in *Hacienda*, the Supreme Court emphasized the desirability of more precisely drawn orders but held that the lack of greater precision was not fatal, at least

much with respect to the order now before the Court. Its findings and conclusions with respect to the conduct which was the subject of the proceeding were incorporated into the order by specific reference (R. 87) and, when petitioners complained that the examiner's recommended order was too broad, the Board specifically stated that the transportation operations "which we are prohibiting . . . are set forth with sufficient clarity in the initial decision" (which the Board adopted) and that reference thereto "will resolve any possible doubts as to what transportation services are prohibited" (R. 84).

In short, there is simply no basis for the contention that the order extends to activities other than those like or related to the Magic Carpet Tour. It follows that petitioners' contention that they are not sufficiently apprised of the conduct enjoined is without merit. Equally without merit is their attempt

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where the order was not self-executing. The Board's cease and desist orders are not self-executing, even after they have been sustained in statutory review proceedings. As in the *Broch* case, the Board's orders must be enforced by a district court (Section 1007, 40 U.S.C. 1487) and a violation of the order must be shown. Thus, petitioners would run no risk of penalties for contempt unless they later violated the district court's enforcement order.

It should also be noted that the terminology of the Board's order in no way increases petitioners' risk of incurring criminal penalties. Section 902 of the Act (49 U.S.C. 1472) imposes such penalties not only for violation of Board orders but also for any violation of, among other provisions, Section 401(a). Thus, if petitioners were to engage in activities constituting "air transportation" without obtaining a certificate of public convenience and necessity, they would be subject to criminal penalties regardless of whether the activities in question were within the scope of the Board's order.

to distinguish *Hacienda* on the ground that the order there sustained did not run against persons primarily engaged in extensive aviation activities. Petitioners concede that hotel operators such as Hacienda and Dunes "can understand that the order directs them to cease operating tour flights" (Br., p. 21), and there is no explanation of why Trans-Global, Rich, and Miller cannot understand that it directs them to cease engaging in operations of the same kind.

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted,

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MAY 1962

APPENDIX

Relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 *et seq.*) are:

DEFINITIONS

SEC. 101. [72 Stat. 737, 49 U.S.C. 1301] As used in this Act, unless the context otherwise requires—

* * * * *

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * *

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the oper-

ation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

*   *   *   *   *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

SEC. 401. [72 Stat. 754, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

U.S. GOVERNMENT PRINTING OFFICE: 1962